IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

ARNOLD MAXWELL HARRIS, )
Petitioner, )
vs. )
THE STATE OF WASHINGTON, ) No. 7064
Respondent, )
and )
ROBERT D. McMULLEN, Judge of the Superior Court for Clark County, )
Respondent. )

70-5213

Supreme Court, U.S.
FILED
SEP 10 1971
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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# BRIEF FOR THE RESPONDENT

To the Honorable, the Chief Justice and Associate Justices of the United States.

## OPINIONS BELOW

Attorney for Respondent accepts petitioner's Opinions as set forth in Petitioner's Brief.

## JUDGMENT

The judgment of the Washington State Supreme Court was entered on February 4, 1971. Rehearing was denied on March 24, 1971.

## QUESTIONS PRESENTED

Does the double jeopardy provision of the Fifth Amendment to the United States Constitution prevent the State of Washington from trying petitioner, Arnold Maxwell Harris, for the alleged

murder of Mark Allen Harris and the alleged assault of Laila Violet Harris by means of a bomb sent through the mail when a jury found him innocent on a charge of murdering Ralph Burdick who was killed in the explosion of the same bomb.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . Volume 1 U.S.C., Page XLVI.

STATEMENT

In Ashe vs. Swenson, 397 U.S. 436, 25 L. Ed 2d 469, 90 S. C. 1189 (1970), collateral estoppel became a constitutional protected doctrine under the Fifth Amendment. The Supreme Court of the United States in that decision observed, "The rule of collateral estoppel in criminal cases is not to be applied with the hypocritical and archaic approach of a nineteenth century pleading book but with reason and rationality."

In the light of the United States Supreme Court statement as such the Supreme Court of the State of Washington in the case of State of Washington vs. Arnold Maxwell Harris reported at 78 W.D. (2d) 919 en banc examined the entire record to ascertain whether the purpose of the constitutional protection against double jeopardy with respect to the application of collateral estoppel applied.

The Washington State Supreme Court did not examine the record with respect to collateral estoppel in a hypocritical and archaic manner but rather with reason and rationality. It was examined from the standpoint of protecting the defendant, Arnold Maxwell Harris, from being harassed from multi-prosecutions if in fact that was the case. It was examined from the standpoint of whether or not the State had deliberately chose to get a "dry run" by prosecuting its cases in this sequence. These

questions were answered in the negative.

In Ashe vs. Swenson, supra, the State candidly admitted that the first trial was merely a dry run for a second trial. The respondent herein made every effort to introduce, at the time of the first trial, a threat letter into evidence but was barred by the court's rulings. Petitioner, Arnold Maxwell Harris' attorney in the first trial continually objected in a most vehement manner with respect to introducing the threat letter into evidence. The salient portion of said letter is set forth in the en banc opinion of the State of Washington Supreme Court affirming trial court on Page 4, Footnote 1 as contained in the transcript of record as forwarded to the Supreme Court of the United States.

The trial of the State of Washington vs. Arnold Maxwell Harris cannot be equated to Ashe vs. Swenson, supra. In the second trial of Ashe vs. Swenson, supra, the witnesses were for the most part the same and their testimony in the second trial was "substantially stronger" with respect to the identity of the petitioner, Bob Fred Ashe. Two witnesses in the original trial who were unable to identify the petitioner, testified in the second trial that his features, size and mannerism matched those of one of their assailants. In another instance, one of the witnesses who had in the first trial identified the petitioner, Bob Fred Ashe, only by his size and actions subsequently remembered him by the unusual sound of his voice.

It is also to be found that in the second trial, the State absolutely failed to call a witness who had failed to identify the petitioner, Bob Fred Ashe, in the first trial. This is pure and simple a "dry run" and a refinement of the first trial. These facts do not apply to the case at hand. Fundamental fairness must apply for both the State of Washington as well as to Arnold Maxwell Harris.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. BRENT NEVIN
Prosecuting Attorney
Clark County, Washington

Attorney for Respondent

# HARRIS *v.* WASHINGTON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 70-5213. Decided November 16, 1971

The principle announced in *Ashe* v. *Swenson*, which bars a second criminal trial where the defendant has been acquitted in a previous trial involving the same ultimate factual issue, applies irrespective of whether the jury in the first trial considered all relevant evidence, and irrespective of the State's good faith in bringing successive prosecutions.

Certiorari granted; — Wash. 2d —, 480 P. 2d 484, reversed.

PER CURIAM.

On June 10, 1969, a bomb sent through the mail exploded in the residence of Ralph Burdick in Clark County, Washington. The explosion killed Burdick and the petitioner's infant son, Mark Allen Harris, and seriously injured the petitioner's estranged wife, Laila Violet Harris. The petitioner was tried in a state court for the murder of Ralph Burdick and was acquitted by a jury. He was immediately rearrested on informations charging the murder of Mark Allen Harris and the assault upon Laila Violet Harris. To these informations the petitioner entered pleas of former jeopardy and collateral estoppel, and moved to dismiss. The trial court denied the motion and struck the defenses.

The state Court of Appeals granted a writ of prohibition on the grounds of collateral estoppel, finding that "the record demonstrates without question that the retrial of petitioner for assault and murder will require relitigation of the same ultimate fact" determined adversely to the State in the previous trial—*i. e.*, whether it was the petitioner who had mailed the bomb. 2 Wash. App. 272, 291-292, 469 P. 2d 937, 948. The Supreme

Court of Washington agreed that the same ultimate issue was involved in both prosecutions, but nevertheless reversed the Court of Appeals and denied the writ of prohibition. The court noted that a ruling on the admissibility of evidence during the murder trial had resulted in the exclusion, on grounds having "no bearing on the quality of the evidence," of a letter allegedly written by the petitioner and containing threats against the lives of Mr. Burdick and Mrs. Harris. — Wash. 2d —, 480 P. 2d 484, 487–488. Because of its view that this evidence would clearly be admissible in the second trial, the court held that the issue of identity had not been "fully litigated" in the previous trial, and that the doctrine of collateral estoppel did not bar a subsequent trial in which litigation of the issue will be "complete."

Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the petitioner, a claim separate and apart from the question whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U. S. C. § 1257. See *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, 558.

In *Ashe* v. *Swenson*, 397 U. S. 436, we held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. See *Benton* v. *Maryland*, 395 U. S. 784. We said that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U. S., at 443. The State concedes that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and

irrespective of the good faith of the State in bringing successive prosecutions.

Since *Ashe* v. *Swenson, supra,* squarely controls this case, the motion for leave to proceed *in forma pauperis* is granted, the petition for a writ of certiorari is granted, and the judgment is

*Reversed.*

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the petition and reverse the judgment both for the reasons stated in the *per curiam* opinion and for the reasons stated in MR. JUSTICE BRENNAN'S concurring opinion in *Ashe* v. *Swenson,* 397 U. S. 436, 448.

CHIEF JUSTICE BURGER, dissenting.

The Court's summary act without hearing argument in this case is wrong in two respects: first, it is another instance of importing into the administration of criminal justice the civil doctrine of collateral estoppel to which I dissent for the reasons stated in my dissent in *Ashe* v. *Swenson,* 397 U. S. 436, 460 (1970); second, even assuming the collateral estoppel approach has validity, the evidence in this case in the second trial is not the "same evidence" on which the first case was submitted so that this is not a case for application of that unsound doctrine.

MR. JUSTICE BLACKMUN, dissenting.

My own views on the issue presented by this case were expressed when I wrote for the Court of Appeals in *Ashe* v. *Swenson,* 399 F. 2d 40 (CA8 1968), reversed and remanded, 397 U. S. 436 (1970). I am not persuaded as to the rightness of the Court's imposing in that case—as a Fifth Amendment-Fourteenth Amendment imperative—the concept of collateral estoppel upon a state

criminal proceeding. I could have understood a flat overruling of *Hoag* v. *New Jersey*, 356 U. S. 464 (1958), and of *Ciucci* v. *Illinois*, 356 U. S. 571 (1958), despite the interim appearance of *Benton* v. *Maryland*, 395 U. S. 784 (1969). But overruling those two cases was a step the Court, for reasons that escape me, refused to take or felt it could not take.

Neither am I persuaded by the "single frolic" or "one criminal episode" or "same transaction" theory espoused by the Justices in concurrence in *Ashe* v. *Swenson*, 397 U. S., at 448–460. That approach would place multiple but separate-shot murders under the protective umbrella of double jeopardy. I cannot subscribe to reasoning which would necessarily produce a result of that kind.

I therefore dissent.